United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7638

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

RESTAURANT ASSOCIATES INDUSTRIES, INC.,
Plaintiff-Appellant,

—v.—

ANHEUSER-BUSCH, INC.,
Defendant-Appellee,

—and—

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE ANHEUSER-BUSCH, INC.

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PRELIMINARY STATEMENT

This is an appeal from a judgment entered after trial on November 24, 1976, by the United States District Court for the Southern District of New York, per Pollack, J. dismissing the Amended Complaint of Plaintiff-Appellant, Restaurant Associates Industries, Inc. ("Associates") and directing that judgment be entered in favor of Defendant-Appellee Anheuser-Busch, Inc. ("Busch"), Sidney Sherman ("Sherman") and Sherman Management Corp. (A-584)*

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* References bearing the suffix letter "A" are to the pages of the joint appendix filed in the appeal herein, Docket No. 77-7638. The references to "Br." are to Associates' brief filed herein.

Associates' brief reveals that its appeal is essentially a plea to this Court to make findings of fact different from those found by the Trial Court. Busch submits that the Trial Court's findings of fact were fully supported by the evidence and cannot be found to be clearly erroneous.

STATEMENT OF THE CASE

Pleadings and Proceedings Below

On June 20, 1975, Associates commenced this action by filing and serving a Summons and Verified Complaint. (A-1) The Verified Complaint alleged in substance that Busch was about to breach a written or oral agreement for a fixed term to manage the food and beverage facilities at Busch Gardens, Tampa, Florida.* In the prayer for relief, the Verified Complaint sought preliminary and permanent injunctive relief as well as damages for lost profits at a restaurant in Busch Gardens, The Old Swiss House, and/or for the in-park fast food facilities at Busch Gardens.

On June 23, 1975, Associates applied for an Order to Show Cause and Temporary Restraining Order. The Order to Show Cause and Temporary Restraining Order were signed by Hon. Milton Pollack, United States District Judge, Southern District of New York. (A-1) With the consent of Busch, the date of July 8, 1975 was set for the hearing on Associates' motion for a Preliminary Injunction. The motion sought to enjoin Busch, its agents, employees and others from "undertaking to terminate the management by [Associates] of The Old Swiss House"

* The Verified Complaint inconsistently pleaded that the alleged oral or written agreement was for a fixed term ending on any one of three different dates: December 25, 1975, November 4, 1976 or December 25, 1976. In connection with the Pretrial Order, Associates abandoned its diverse claims based upon alleged oral agreements. (A-385)

and/or "the agreement between [Associates] and [Busch] dated December 8, 1972" pending the final hearing and determination of this action.

On July 3, 1975, Associates served an Amended Complaint. The Amended Complaint was substantially similar to the initial Complaint, except that it added as additional party defendants Sherman and Sherman Management Corp. No affirmative relief was sought against Sherman or Sherman Management Corp.

At a hearing on the Preliminary Injunction on July 8, 1975, the Court heard testimony from witnesses presented by both parties. In support of its motion for a Preliminary Injunction, Associates called Ralph Tolve, one of Associates' Executive Vice Presidents, Joseph Kayatta, an Associates' employee, and, pursuant to subpoena, defendant Sherman. (A-8-A-119) In opposition to the motion, Busch called Dennis Long, Vice President of Busch, and James Bickle, Director of Merchandising of Busch. (A-123-A-175)

Following a full evidentiary hearing, the Court on July 9, 1975 rendered an opinion and entered an order denying Associates' motion for a Preliminary Injunction. (A-176-A-186) Briefly summarized, Judge Pollack held that a letter dated September 24, 1973 sent by Busch to Associates constituted valid notice of termination of the parties' written management agreement "in compliance with the requirements of Paragraph 4(b)" thereof. (A-180) Accordingly, the Court ruled that after December 25, 1973 (the effective date of termination), the parties were conducting their business relationship on an at-will basis without any binding written agreement. (A-184-85) As to Associates' contention that the written agreement was replaced by oral agreement to manage Busch Gardens, the Court concluded:

"No credible evidence has been presented of . . . assent to a management contract . . . for any period beyond December 25, 1973. (A-185)

• • •

What appears to have happened is that the commercial impetus to keep going oblivious to the contractual void was what kept the parties together between December 26, 1973 and the present date—not a contract, either oral or written." (A-184)

Following the denial of the motion for a Preliminary Injunction, Busch answered the Amended Complaint and the parties proceeded to pretrial discovery. Both sides inspected and exchanged copies of a substantial number of documents and Associates noticed and conducted the deposition of Busch, by Messrs. Long, Bickle and Roger Bates. Thereafter, the parties jointly filed a Pretrial Order setting forth the underlying facts and issues of law. (A-365-A-385)

On September 21, 1976, a trial of this case was conducted before Judge Pollack. Associates' proof was limited to the Hearing Transcript, the deposition transcripts of Messrs. Long and Bickle and all exhibits marked thereat, the Pretrial Order, and additional testimony from Mr. Joseph Kayatta. At the conclusion of the trial, Judge Pollack reserved decision.

Thereafter, on November 23, 1976 Judge Pollack rendered a decision dismissing the Amended Complaint and directing entry of judgment in favor of Busch. (A-565-A-583) In summary, the Court concluded: (1) that "[t]he evidence establishes that the term contract was ended in 1973 and that the arrangement thereafter was only one of agency at will" (A-569); and (2) Associates "has failed to prove that Busch's conduct [in negotiating with Sherman] was actionable under any theory." (A-574)

The Facts

As the Pretrial Order evidences, and as the Trial Court found, most of the significant facts are not in dispute. A short factual recitation is, however, necessary as Associates' brief ignores several significant facts.

On October 22, 1969, Associates and Busch entered into an agreement providing for the management by Associates of The Old Swiss House, the snack and juice bars, and other food and beverage facilities located at Busch Gardens. (A-367, par. 15) The term of this agreement was two years commencing as of December 4, 1969, which term was extended by agreement until December 25, 1971.

Subsequently, the parties entered into a new written agreement (hereinafter the "1971-73 Management Agreement").* (A-417-A-430, A-367-68) Its term, as set forth in Article 4, was for two years from the Commencement Date of December 25, 1973. (A-418, A-423-24) Pursuant to the 1971-73 Management Agreement, Associates continued its supervision and operation of all of the food and beverage service areas at Busch Gardens.

While the 1971-73 Management Agreement had a two-year term, in accordance with the provisions of Section 4(b) thereof, it would be automatically renewed upon the same terms and conditions for an additional one-year term, unless written notice was given by either party not less than 90 days prior to the expiration of the initial two-year term. (A-424)

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* While the 1971-73 Management Agreement is dated December 8, 1972, according to its terms, it was retroactive to the "Commencement Date" which was defined in Section 1 thereof as December 26, 1971. (A-418)

On September 24, 1973, Busch sent Associates written notice, as required by Paragraph 4(b) of the 1971-73 Management Agreement, terminating said agreement as of December 25, 1973. The text of this letter is as follows:

> "Please be advised that Anheuser-Busch, Incorporated, desires to renegotiate certain terms of the management agreement which is scheduled to terminate December 25, 1973. This notice is being sent in compliance with the requirements of Paragraph 4(b) of the management agreement.
>
> I have asked Mr. James R. Bickle [Busch's director of merchandising] to contact you shortly in an effort to conclude negotiations with representatives of your company as soon as possible." (A-503)

As the record demonstrates, the termination notice was sent because of Busch's dissatisfaction with some of the terms of the 1971-73 Management Agreement as well as with Associates' performance thereunder and the fact that there had been numerous disputes in connection therewith. (*See, e.g.*, A-512-16, A-531-32) The notice was sent more than 90 days prior to the expiration of the initial term of the 1971-73 Management Agreement and mailed to the designated address for notice contained in Paragraph 14 of the 1971-73 Management Agreement. There is no dispute that Associates received this letter within three days of its mailing. (A-369-70, par. 21)

The conduct of both Busch and Associates after receipt of the notice of termination reflected an understanding that the 1971-73 Management Agreement had been terminated. While the parties attempted to negotiate a new written agreement and even circulated numerous draft proposals, no subsequent written agreement was ever signed. (A-370, par. 22) The failure to reach agreement was due in part

to Associates' objection to material contractual terms proposed by Busch. (A-371, par. 27, A-447)

Although no new written agreement was ever executed, Associates and Busch continued doing business on an informal basis. As the Trial Court found, it was "commercial impetus" that kept the parties together in an at-will arrangement while they continued negotiating what they hoped would become a new agreement. (A-184) While these negotiations never reached fruition in the execution of a new written agreement, they did give rise to informal or oral arrangements which modified in material respects the terms upon which the parties had formerly operated. Among these changes were: (1) a reduction, at Associates' insistence, of Busch's share of the gross receipts from the fast food operations from 40% to 35%; (2) an agreement by Associates to employ an additional maintenance man; (3) an agreement by Associates to pay a greater share of routine expenses; and (4) commencing as of November 4, 1974, Associates ceased managing any of the fast food operations and thereafter managed only The Old Swiss House. (A-242-43, A-371-72, par. 28, A-526-27)

On September 18, 1974, Mr. Bickle, on behalf of Busch, sent Associates another proposed written agreement. (A-431-46) Associates again objected to the terms of this contract, refused to sign it and submitted a counter-proposal. (A-372, par. 30, 31) As Associates' counter-proposal was materially different from that submitted by Busch, it was never agreed to by Busch nor executed by either of the parties. (A-43-46; A-374, par. 37)

Faced with the parties' failure to reach any agreement on the terms of a new written contract and Busch's continued dissatisfaction with Associates' performance, Busch decided in late 1974 and early 1975 to explore alter-

native management arrangements for Busch Gardens. Thereafter, a decision was made to terminate Associates and, by letter dated May 21, 1975, Busch gave Associates written notice that Associates' engagement to manage The Old Swiss House terminated as of June 30, 1976. (A-470)

Sidney Sherman commenced his employment as Associates' manager at The Old Swiss House on or about January 1, 1974. Although he had previously been employed by Associates, he never had a written contract of employment or management with Associates. (A-116; A-374, par. 40) Indeed, at the time of the events in dispute, Sherman was employed pursuant to an at-will arrangement without any fixed term. (A-116) This lack of a fixed term obligation is evidenced by the fact that on several occasions during his employment at Busch Gardens, Sherman indicated to both Associates and Busch that due to pressing personal reasons he would not leave Tampa and, if ordered to transfer, he would resign from Associates' employ. (A-112-14)

Since Busch was aware of Sherman's desire to work in Tampa and his at-will arrangement with Associates, Busch considered, as one alternative, having Sherman run The Old Swiss House for himself. (A-158; A-269-83) During the ensuing discussions with Busch, Sherman expressed his desire to remain an employee of Associates, but suggested that he would reconsider if Busch were unable to reach a new management agreement with Associates. (A-159) After Busch's firm decision to terminate Associates was made, Busch again contacted Sherman, and only at that time was an agreement reached between Sherman and Busch. (A-90; A-283-84)

Following Busch's decision to terminate Associates and to employ Sherman, this litigation ensued.

ARGUMENT

POINT I

Busch Is Not Liable for Breach of Contract Since It Was Entitled to Terminate Its At-Will Arrangement With Associates at Any Time.

A. The Notice Dated September 24, 1973 Was Sent in Compliance With the Terms of the Agreement and Was Sufficient to Effect Termination of the 1971-73 Management Agreement Between Busch and Associates.

As indicated above, on September 24, 1973, Busch sent Associates a letter which stated *inter alia* that:

> "Please be advised that Anheuser-Busch, Incorporated, desires to renegotiate certain terms of the management agreement which is scheduled to terminate December 25, 1973. *This notice is being sent in compliance with the requirements of paragraph 4(b) of the management agreement.*" (Emphasis added.) (A-503)

Associates now contends that this letter "could not stand as an effective notice of termination because of its patent ambiguity." (Br. at 11) This assertion ignores the fact that this letter expressly stated that it was a notice sent pursuant to the cancellation clause of the 1971-73 Management Agreement. (A-424, par. 4(b)) Moreover, this letter apprised Associates that Busch was dissatisfied with the terms of the operative 1971-73 Management Agreement, that the 1971-73 Management Agreement would terminate by its terms on December 25, 1973 and that thereafter the relationship would be governed by such different terms as agreed to by the parties. Plainly this letter operated to terminate the 1971-73 Management Agreement. As the Trial Court held:

> "The Busch letter gave Associates sufficiently clear and unequivocal notice that the Management Agreement would not be automatically renewed and would thus terminate at the end of the initial term. It explicitly stated that it was being sent as notice 'in compliance with the requirements of Paragraph 4(b) of the Management Agreement,' *i.e.,* the paragraph providing for automatic renewal unless notice of the termination were given. The letter noted that the Agreement was scheduled to terminate on December 25, 1973, and that Busch wished to renegotiate its terms. Busch's expression of its desire to renegotiate does not alter the fact that the letter was sufficient to put Associates on notice that there would not be an automatic renewal." (A-570)

Contrary to Associates' contention (Br. at 12), it is settled law that where, as in this case, a contract provides for termination by written notice, any reasonable and clear form of notice is sufficient to effect termination. *E.g., Sharpe* v. *Great Lakes Steel Corp.,* 9 F.R.D. 691, 694 (S.D.N.Y. 1950), relying upon *Lyon* v. *Pollard,* 87 U.S. (20 Wall) 403, 407 (1874). If a contract provides for the giving of notice as a condition precedent to the termination of a contract, such notice should be "liberally construed, the true intent and purpose of the parties in the ordinary rules of trade being kept in mind." *Western Oil & Fuel Co.* v. *Kemp,* 245 F.2d 633, 642 (8th Cir. 1957); 17-A C.J.S. *Contracts* § 402 (1963). This is particularly true where a contract provides for optional termination by either party. *L.G. Balfour Co.* v. *Brown,* 110 S.W. 2d 104, 107 (Tex. Ct. Civ. App. 1937). *See also White Sewing Machine Co.* v. *Shaddock,* 79 Ark. 220, 95 S.W. 143, 144 (1906).

Ignoring this fundamental rule of construction, Associates seeks to avoid the effect of the September 24, 1973 letter by arguing that there were three purported technical

irregularities in the form of the notice. These same arguments were advanced at trial and were flatly rejected. Associates' brief (Br. at 12-13) has added nothing to the arguments made at trial. Judge Pollack's decision as to Associates' contentions that: (1) the letter was not sent by registered mail; (2) the letter was allegedly addressed to the wrong corporation; and (3) the letter was not timely so succinctly disposes of each of these issues that we quote him in full.

(1) That notice was sent by regular mail:

> "Associates contends that the Busch letter which it admittedly received within the usual time for mail delivery (three days) was nonetheless ineffective to terminate the contract between the parties because it was sent by regular mail, not by registered or certified mail as specified in the Management Agreement. Associates made no objection at the time to the form of the posting and the point lacks merit. An argument identical to that advanced by Associates was rejected in *Barbier* v. *Barry*, 345 S.W.2d 557 (Tex. Ct. Civ. App. 1961), which held that if such a letter was in fact received the failure to send it by registered or certified mail does not destroy its effectiveness as notice." * (A-571-72)

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* Accord: *Fleischer Co.* v. *U.S.*, 311 U.S. 15 (1940) ("We think that the purpose of this provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory . . . when the required written notice within the specified time had actually been given and received"); *Utilities Engineering Institute* v. *Bendall*, 84 A.2d 423 (Munic. Ct. App. D.C. 1951). The Trial Court's decision in a footnote distinguished *Phillips* v. *Kastens*, 188 N.Y.S. 121 (1st Dep't 1921), relied on by Associates as follows: "[I]n that case the intended recipient of a letter purporting to be notice of termination of a contract, sent via the ordinary mail, denied ever having received the letter." (A. 572) Associates further asserts that "businessmen attach a certain significance to correspondence which if received via certified or registered mail which is not attached to pieces received

(2) That the letter was allegedly sent to the wrong corporation:

> "Associates also asserts that the September 24, 1973 letter was ineffective because it was addressed to Restaurant Associates, Inc., instead of Restaurant Associates Industries, Inc., the name used in the Management Agreement. However, the letter was addressed to the corporate officer of Associates specified in the Management Agreement and was mailed to the proper street address and it was duly received by the party for whom it was intended. This minor misstatement of Associates' corporate name did not destroy the letter's effectiveness as notice." (A-572-73)*

(3) That the letter was mailed 91 days before termination:

> "Associates claims further that the September 24, 1973 letter was ineffective to terminate the Management Agreement because although it was mailed 91 days before the December 25, 1973 expiration date, it was not received until 88 days before that date. The Agreement, however, provided not that notice should be received but that notice should be given not less than 90 days prior to the expiration date. There is no indication that the parties intended time of receipt to be of the essence. To the contrary, the Management Agreement provided that letters sent via registered or certified mail should be deemed effective as of the date of the mailing thereof. It would be unrealistic

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in the ordinary course of mail" and that its Executive Vice President construed Busch's notice "as an invitation to renegotiate . . . and not as a legally operative instrument to terminate the agreement" (Br. at 12, *see also* Br. at 13). No support for this proposition is cited and none exists.

* *See Ives* v. *Mars Metal Corporation*, 23 Misc.2d 1015, 196 N.Y.S. 2d 247 (Sup. Ct. N.Y. Co. 1960).

to view the 1973 letter to have been too late when no such thought crossed the mind of Associates until this litigation and no prejudice resulted from the alleged delay. *See Music, Inc.* v. *Henry B. Klein Co.*, 213 Pa. Super. 182, 245 A.2d 650 (1968)." (A-573-74)

B. Busch Intended to Terminate the 1971-73 Management Agreement Through Its Notice Dated September 24, 1973.

Associates also contends that the September 24, 1973 letter was not "intended as a notice of termination of the Management Agreement." (Br. at 16) The overwhelming weight of evidence, however, supports the conclusion reached by the Trial Court that Busch intended the notice to terminate the 1971-73 Management Agreement and the parties so understood this to be its effect.

(1) *The Testimony of Messrs. Long and Bickle*

The testimony of Messrs. Long and Bickle, the Busch employees principally involved, demonstrates conclusively that they intended the September 24, 1973 letter to terminate the contractual relationship between Associates and Busch as of December 25, 1973. Mr. Long's testimony (on examination by Associates) in this respect is dispositive:

> "Mr. Schaeffer: Was it your intention, Mr. Long, in sending Defendant's Exhibit A to Restaurant Associates, Inc. to terminate Plaintiff's Exhibit 5 [the 1971-73 Management Agreement]?
> A. To terminate Plaintiff's Exhibit 5, which is the contract between R.A. and St. Louis?
> Q. That was your intention? A. It was." (A-317)*
>
> * * *
>
> "Q. Did you draft the words of Plaintiff's Exhibit A —of Defendant's Exhibit A? A. Most likely not. Our Legal Department probably did.

* *See also* Long depo. at A-334-35.

Q. Do you have a specific recollection? A. No I really don't, but the carbon copies go to Jim Bickle and Rich Schwartz. Rich Schwartz is one of our legal counsel." (A-317)

In his deposition, Mr. Bickle recounted a conversation he had with Mr. Long in early September 1973, which further reflects on Mr. Long's intent in sending the notice:

"Mr. Schaeffer: Can you tell me what, if anything, you said to Mr. Long and what, if anything, he said to you?

A. I reminded Mr. Long that there was a requirement that an official notice be sent whereby the existing contracts would terminate unless it could be renegotiated.

Q. Is that what you told Mr. Long? A. Yes.

Q. What, if anything, did Mr. Long say to you? A. He said he would check with the legal department and see that the notice was sent.

Q. Was a decision thereby reached to terminate the contract dated December 8, 1972? A. If a subsequent agreement could not be reached, I think it was understood." (A-223-25)*

The testimony of Messrs. Long and Bickle leaves no doubt that Busch intended the September 24, 1975 notice to terminate the 1971-73 Management Agreement and that Busch believed that the 1971-73 Management Agreement had in fact been terminated. As the Trial Court found:

"The Busch vice president who wrote the letter testified that it was his intention in sending the missive to terminate the contract with Associates. Busch's director of merchandising testified that it was his understanding that after December 25, 1973 there was no contractual agreement in force and that Associates continued to operate Old Swiss House pursuant only to an 'ongoing understanding.'" (A-571)

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* *See also* Bickle depo. A-223-34, A-252.

Associates' suggestion of "inconsistencies" in the testimony of Busch's witnesses at their depositions is unfounded. Apparently, Associates confuses the parties' understanding about the termination of the 1971-73 Management Agreement and their understanding about the subsequent termination of the informal business relationship. (*See e.g.*, A-221-22; A-311-13) But a distinction between these two issues is essential to an understanding of Busch's intent and conduct. Even though Busch terminated the 1971-73 Management Agreement as of December 25, 1973, it did not wish to terminate its business relationship with Associates at that time. To the contrary, as the testimony makes clear, Busch repeatedly and in good faith sought to have Associates execute a new written agreement, but Associates continuously declined to do so. (*See* A-337-39)* In any event, Associates is now asking this Court to reverse the Trial Court on an issue of fact, to wit, what the intention of the parties was with respect to the September 24, 1973 notice. Yet Associates has made no showing that that finding was erroneous, much less clearly erroneous. Absent this showing, the Trial Court's findings should not be disturbed.

(2) *The Conduct of the Parties*

The conduct of Associates and Busch during the 1971-73 period also supports the conclusion that both parties un-

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* During the deposition testimony of Messrs. Long and Bickle, Associates referred to some of Busch's internal documents which were obviously written on the assumption that Associates would execute the draft written agreements forwarded to it. (*See, e.g.*, A-530-31) Since the draft proposed agreements were never executed, any statements concerning such draft agreements contained in Busch's internal documents are plainly irrelevant. These same documents are again referred to by Associates in its brief. Yet read in context, each document is entirely consistent with the position that the 1971-73 Management Agreement terminated as of December 25, 1973.

derstood the 1971-73 Management Agreement to be terminated.*

Although both parties continued their business relationship from December 25, 1973 (the effective termination date) until July 9, 1975 (the last day Associates managed The Old Swiss House), the parties engaged in periodic discussions concerning the terms of a new written agreement. These negotiations are entirely incompatible with any idea that the old agreement was to continue. (A-369-374) Several of these draft agreements expressly acknowledge that the 1971-73 Management Agreement had been terminated. For example, the Amendment proposed by Busch in January, 1974 recites that "Busch gave timely notice of its intent to terminate the Agreement on December 25, 1973." (A-506)

After the 1971-73 Management Agreement terminated, the parties made substantial changes in the terms and conditions of their relationship by informal understandings. For example, effective January 1, 1974, Busch's percentage of gross receipts from the fast food operations was reduced to 35% and Associates agreed to employ an additional maintenance man. (A-371-372, par. 28) Several other demands of Associates were rejected by Busch. (A-527)

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* Although Mr. Tolve, Associate's Vice President and the actual recipient of the September 24, 1973 letter, testified in the proceedings herein, he was not asked by Associates to testify as to his understanding of the letter. The statement as to his supposed understanding contained in page 12 of Associates' brief is without support in the record. Moreover, as discussed above, the documentary evidence demonstrates that Associates was well aware that the 1971-73 Management Agreement had been terminated.

The Trial Court concluded that all of these circumstances point to the absence of a renewal of the term contract:

> "The parties engaged in extensive negotiations after December 25, 1973 aimed at achieving a new contract, in the course of which they apparently negotiated and implemented oral agrements controlling the on-going relationship. The Management Agreement had provided that amendments thereto could be accomplished only by a signed writing. The informal oral agreements reached in the negotiations after the termination were inconsistent with the substantive provisions of the Management Agreement, a circumstances supporting the absence of a renewal of the term contract." (A-571)

In sum, since the September 24, 1973 notice operated to terminate the last written management agreement between the parties and to bar any automatic renewal, the subsequent informal business relationship between the parties was terminable by either party at will. 53 Am. Jur. 2d *Master and Servant* § 27 at 104; *Cf. Florida-Georgia Chemical Co.* v. *National Laboratories, Inc.* 153 So. 2d 753, 754 (Dist. Ct. App. Fla. 1963). The termination of such an at-will contract is not a breach of the contract and will not sustain an action for damages. *Id.**

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* In view of the foregoing discussion, there is no need to discuss whether the conduct of the parties during 1974 would have terminated the 1971-73 Management Agreement if same was still in existence during that period. Suffice it to say that *both* parties hereto were dissatisfied with their then existing relationship, expressed an intention to modify the terms of their relationship substantially, had extensive negotiations concerning changes thereof and acted thereupon. As such, the existence of this mutual intent to modify the "contract" would have been sufficient to constitute a declaration to terminate it. *See, e.g., L.G. Balfour Co.* v. *Brown*, 110 S.W.2d 104 (Tex. Ct. Civ. App. 1937).

POINT II

Busch Is Not Liable For Negotiating or Contracting With Sherman and Sherman Management.

The evidence adduced at trial shows that neither Sherman nor Busch are guilty of any wrongdoing in their dealings with one another. Sherman became manager of The Old Swiss House in 1974. As he never had any employment or management contract with Associates, his relationship was that of a mere employee, a relationship that could be terminated at will by either party.

While conceding its lack of contractual restraint over Sherman, Associates argues that Busch should not have interfered with Sherman's obligations to Associates as a "fiduciary." Yet Sherman was never an officer or director of Associates and was no more than one of dozens of restaurant supervisors employed by Associates.

Nor can Associates properly question the good faith of Sherman or Busch. The evidence indicates that Sherman repeatedly informed both parties that for personal reasons he would not leave Tampa and, if transferred by Associates, he would resign. (A-112-14) Busch was aware of Sherman's feelings about Tampa and correctly believed that Sherman was under no legal obligation to Associates.

Only when it became apparent that Associates and Busch were unable to agree on the terms of a long-term relationship (for reasons having nothing to do with Sherman), did Busch begin discussions with Sherman. (A-89) Sherman indicated that he preferred to remain with Associates if the parties could resolve their differences, but if they could not, Sherman stated he would consider an offer from Busch in lieu of a transfer by Associates. (A-159)

After the negotiations broke down, Busch decided to terminate Associates and thereafter advised Sherman of this fact. (A-90, A-275) Faced with the imminent departure of Associates from Busch Gardens, Sherman accepted Busch's offer of employment. (A-90) As Sherman testified on direct examination by Associates:

> "Mr. Bickle told me that he had orders from upstairs to terminate the association with Restaurant Associates and he would like me to manage the place for them, and when I hesitated about it he said, 'Look, Sid, if it's not you, its going to be somebody else. Mr. Clements and Mr. Tolve know we have other people looking at the place, so make up your mind now. If it's not you, it surely is not going to be Restaurant Associates.'
>
> He put it so strongly that RA was going to be out and if I didn't decide to manage for them, they would have another company in, that is when I decided to accept." (A-90)

There is not a shred of evidence to support Associates' claim that Sherman "engaged in a transaction which brought his personal interest into conflict with his obligations as a fiduciary". (Br. at 18) As the Trial Court found:

> "This is not a case in which an agent procured for himself a contract that might just as easily have been procured for his employer. Sherman agreed to work for Busch only after learning that Busch had resolved to end its relationship with Associates." (A-578)

The conduct of Sherman and Busch does not support a claim for damages. The general rule is clear: absent improper or unlawful means, the inducement to leave an employment at will is not actionable, whether the theory is breach of fiduciary duty, tortious interference with a busi-

ness relationship, or unfair competition. *Cadillac La Salle Co. of Palm Beach* v. *Claude Nolan, Inc.*, 158 So. 883 (Fla. 1935); *see Annot.* Employment-Inducing Change, 24 A.L.R. 3rd 821 (1969); *Taller & Cooper, Inc.* v. *Neptune Meter Co.*, 8 Misc. 2d 107, 166 N.Y.S.2d 693 (Sup. Ct. N.Y. Co. 1957); W. Prosser, *Handbook of the Law of Torts*, § 129 at 946 (4th Ed. 1971).

The rationale for allowing a competitor to negotiate with an employee who is not bound by contract was cogently articulated by Judge Learned Hand:

> "So far as we have found, it has never been thought actionable to take away another's employee, when the defendant wants to use him in his own business, however much the plaintiff may suffer. It is difficult to see how servants could get the full value of their services on any other terms; time creates no prescriptive right in other men's labor. If an employer expects so much, he must secure it by contract." *Harley & Lund Corp.* v. *Murray Rubber Co.*, 31 F.2d 932, 934, (2d Cir.), *cert. denied*, 279 U.S. 872 (1929).

The cases cited by Associates (Br. at 22) are consistent with this general rule. *Dade Enterprises, Inc.* v. *Wometco Theatres, Inc.*, 119 Fla. 70, 160 So. 209 (1935) involves interference with existing contractual obligations, a circumstance not present in this case. Associates also cites *John B. Reid & Associates, Inc.* v. *Jimenez*, 181 So. 2d 575 (Fla. App. 1965); *Mead Corporation* v. *Mason*, 191 So. 2d 592 (Fla. App. 1966) and *Franklin* v. *Brown*, 159 So. 2d 893 (Fla. App. 1964) where the plaintiffs alleged that the defendants had used "fraudulent schemes" to avoid paying the plaintiffs a real estate commission. No fraudulent schemes were alleged here and none were proved at trial.

Associates seeks to avoid these well settled principles by arguing that Busch stood in a position of "confidence" and "dependency" with it. (Br. at 21) But the cases Associates cites do not support such a position. This case bears no resemblance to *Duane Jones Company, Inc.* v. *Burke,* 306 N.Y. 172, 117 N.E.2d 237 (1954). There, several defendant officers of plaintiff's corporation conspired to steal plaintiff's clients so that plaintiff's business would have been or crippled or destroyed. No such drastic consequences can be attributed to Busch's employment of Sherman. Busch's engagement of Sherman was not made until after Busch had irrevocably committed itself to terminating Associates and was undertaken for the sole purpose of securing the services of a particular employee. Nor was Associates dominated by or dependent on Busch (A-398) as was the situation in *A. S. Rampell* v. *Hyster Company,* 3 N.Y.2d 369, 165 N.Y.S.2d 480 (1957). As the Trial Court found: "[t]he evidence does not establish Associates' economic dependence on Busch". (A-582)

Nor is this case of an ulterior motive in "stealing" an employee from a competitor to appropriate the competitor's goodwill or to injure the competitor's business. *Cf. Albee Homes, Inc.* v. *Caddie Homes, Inc.,* 417 Pa. 177, 207 A.2d 768 (Pa. 1965). To the contrary, the facts in evidence do not show a conspiracy or intent to injure Associates' business. As the Trial Court held "Associates has not proved that . . . Busch's real purpose was to appropriate the staff and goodwill of Associates." (A-582) Busch's engagement of one of Associates' many restaurant managers certainly does not evidence an intent to injure Associates or to dominate its business—the facility was but one of many which Associates operated. Moreover, given the lack of executive status accorded managers by

Associates, Sherman was hardly a key employee without whom Associates' business would fail. (A-398)

As the Trial Court observed (A-578), this case is similar to *Anker* v. *Dobbs,* 57 So. 2d 432 (Fla. 1952). In that case, the Florida court affirmed the dismissal of a complaint alleging breach of fiduciary duty by a franchisee's employees who had contracted with the franchisor to replace their employer as franchisee. Noting that the defendants had made no effort to secure the contract until learning that their employer's franchise was in danger of being taken from him, the court held that the employer had failed to carry the burden of proving that the defendants had induced the cancellation of his franchise.

Since Busch was free to deal with Sherman and Sherman was free to deal with Busch, their dealings with each other do not give rise to any liability. As Judge Learned Hand held in *Triangle Film Corp.* v. *Artcraft Pictures Corp.,* 250 F. 981, 982 (2d Cir. 1918):

> "Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's employe[e] so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employe[e] more effectively and to such employe[e]s as might receive added pay. It would put an end to any kind of competition."

CONCLUSION

For the foregoing reasons, Defendant-Appellee Anheuser-Busch, Inc. submits that the judgment entered below in its favor dismissing the Amended Complaint in its entirety be affirmed in all respects.*

Respectfully submitted,

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* Associates asks this Court, in any event, to reverse the judgment to the extent that it also is in favor of Sherman and Sherman Management Corp. Since Associates named them as "necessary parties" pursuant to F.R.C.P. Rule 19 and urged below (as they do here) that they breached duties to Associates, Associates can hardly complain that the judgment was entered in their favor as well.

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